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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Number 831

315-803

■

ERMINIO MORANTE, *Petitioner*

v.

THE PEOPLE OF THE STATE OF NEW YORK

■

Petition for Writ of Certiorari to the County Court of Westchester County, State of New York

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The statute is invalid and unconstitutional as construed and applied because it deprives petitioner of his right of freedom to worship Almighty God as by Him commanded in the Bible and according to dictates of petitioner's conscience, and of freedom of the press, contrary to Section One of the Fourteenth Amendment to the United States Constitution 18

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Petition for Writ of Certiorari to the County Court of Westchester County, State of New York

To the SUPREME COURT OF THE UNITED STATES OF AMERICA:

The petition of Erminio Morante shows to the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Statement of Facts.*

The petitioner is an ordained minister of Jehovah God and is known as one of Jehovah's witnesses.

This is a criminal action. Petitioner was arrested June 14, 1940, and charged with desecrating the Sabbath through a violation of Section 2147 of the Penal Law of the State of New York, because he was alleged to have publicly offered

for sale and attempted to sell a pamphlet entitled *Judge Rutherford Uncovers Fifth Column.*

He was charged with said offense on complaint of John F. Cregier before Stanley E. Anderson, Police Justice of the Court of Special Sessions in the Village of Mount Kisco, New York, on such date. On August 22, 1940, he was tried before said justice without a jury. R. 2.

The undisputed evidence established at such trial showed that petitioner was going from house to house in the residential section within the Village of Mount Kisco presenting to residents at their homes the booklet *Judge Rutherford Uncovers Fifth Column,* accepting small money contributions to aid in printing and distributing more like literature; and to those unable to contribute but who promised to read he left a copy without contribution. The booklet was offered in evidence as Defendant's Exhibit B, printed in the record at pages 5 to 24. The distribution of the booklet was employed by the petitioner as his way of worshiping Almighty God.

The booklet is paraphrased as follows:

> 'THIS BOOKLET publishes the letter of the author written and addressed to a reporter of the New York *Post* in response to the request for information, for publication in said newspaper, concerning Jehovah's witnesses, who at that very time were prominent before the public eye because of the violent persecutions that had broken out throughout the land and the numerous false charges hurled against them by members of the Roman Catholic Hierarchy and other religionists, including the accusation that Jehovah's witnesses were *fifth columnists* and a subversive organization financed by the totalitarian powers of Europe.
>
> 'Because the information was vital to millions of other Americans besides readers of the *Post,* and who were concerned about the preservation of American ideals of free speech, press, assembly and worship, the

aforesaid letter was printed and circulated (with additional comments) throughout the United States. (And fortunately, too, for Americans, because the *Post* failed to print Judge Rutherford's statement as supplied them, and the general acceptance and appreciation of the American public of this most timely information is marked by its wide distribution, as indicated in the *Yearbook of Jehovah's witnesses* for 1941, pages 67, 68: "The booklet *Judge Rutherford Uncovers Fifth Column* started through the factory on June 28, and in but three months 5,523,322 have already gone out.")

'This booklet furnishes the author's candid answers to the probing questions of the reporter as to the outburst of violence against Jehovah's servants, the identity of those participating openly in or outspokenly inciting to such violence, the distorted charges published against them in religious and secular newspapers, the cause of the troubles, and the origin, general history and purposes of the society of which Judge Rutherford is president, to wit, the Watch Tower Bible and Tract Society.

'In his replies the author makes no personal attack on anyone, nor is any attempt made to hold up anyone to ridicule or obloquy or shame for his religious or other beliefs, but facts are stated baldly, with no effort to conceal who are the perpetrators of or inciters of and connivers at violation of law and endangerment of American institutions prized by all freedom-lovers, regardless of creed and rank or position. This exposure is not so written or couched as to stir up violence even against the perpetrators or inciters (and the phenomenal distribution of the booklet has not provoked any such as of record), but that Americans, and especially followers of Jesus Christ, might be put on guard against those who conceal their real motives and undermine the freedoms and institutions which have been a boon to this country; and that they might avail them-

selves of the legal and constitutional and orderly means of self-defense.

'The author does not state his opinions, but authentic records of cases in point, and his conclusions are fully established, that the organization which he names is the real *fifth column* in America, and not those whom this very organization accuses of such role; and that the consistent course of the organization he names in connection with mobs, propaganda, false charges, duplicity and activities of opposition to Jehovah's witnesses in deprivation of the exercise of their guaranteed rights as followers and servants of Christ, as well as peaceable citizens, is in agreement with the course of the same organization in foreign lands which have been betrayed by *fifth-column* groups into the power of the totalitarian dictatorships, including Germany, where more than six thousand of Jehovah's witnesses have been imprisoned, many being executed (page 20). Cognizance is taken of the fact (page 31) that "the unanimous Declaration of Independence" of the State of Texas puts the finger on the same organization as inimical to true Americanism and brands its agents as "eternal enemies of civil liberty, the ever-ready minions of power, and the usual instruments of tyrants" and as "denying us the right of worshipping the Almighty according to the dictates of our own conscience". The exposed activities of the Roman Catholic Hierarchy in America against Jehovah's witnesses during 1940 up until publication of this booklet and as briefly set forth herein prove that the said organization is unchanged in purpose and action and has the same spirit as declared in the Texas Declaration.

'The Watch Tower Bible and Tract Society has an open record before the country. It has operated for more than 60 years, including national crises, and it has published the source of its financial means and the use and expenditures of s. ch, in the issues of *The Watch-*

tower and, more recently, the *Yearbook of Jehovah's witnesses*, since 1927, and the author also describes the method of carrying on the Bible educational campaign in America and other lands. (Pages 19-21) And the statement by the then United States Solicitor General, Francis Biddle, during the time of mob action and demand for investigation, clears Jehovah's witnesses of all charges by religionists as to *fifth-column* activities and connections. (Page 32) Judge Rutherford's suggestion of a Congressional investigation of the organization accusing and opposing Jehovah's witnesses (page 22) is a proper conclusion to what he has written in the preceding paragraphs and points out the proper present course to prove beyond controversy who the anti-American *fifth-column* are.'

The undisputed evidence showed that petitioner was an ordained minister of the Almighty, Jehovah God, preaching the Gospel in the manner commanded by Him and following in the footsteps of the Lord Jesus Christ and His apostles, doing good unto the residents of Mount Kisco and performing a work of interest, convenience and necessity.

Petitioner possessed credentials attesting to the fact that he was such ordained minister, which credentials appear as Defendant's Exhibit A at the record, pages 4 and 5.

At the conclusion of such hearing on August 22, 1940, the court took the case under advisement and briefs were submitted and on September 12, 1940, decision was rendered, finding the petitioner guilty as charged because money was accepted for the booklet, and imposing the maximum fine allowed by the statute. R. 4.

On September 16, 1940, petitioner duly presented to the County Judge of Westchester County his affidavit for appeal and certificate of reasonable doubt. (R. 27-30) Thereupon on such date the County Judge of Westchester County signed an order allowing said appeal and directing the

Court of Special Sessions to make its return in the time and manner required by law. R. 30.

Notice of appeal and copy of affidavit for appeal and certificate of reasonable doubt were duly served upon the Court of Special Sessions (R. 4, 26), and copies of same were acknowledged by the District Attorney for Westchester County. R. 30.

Thereafter, in the time and manner required by law, to wit, on April 15, 1941, the case was brought on for argument before the County Court of Westchester County (R. 31) and on May 5, 1941, the County Court entered an order affirming said judgment of conviction (R. 31, 32) and thereupon the Court rendered and entered a judgment affirming said conviction. R. 32.

In the time and manner required by Article 520 of the Code of Criminal Procedure of the State of New York, petitioner duly presented in writing application for allowance of appeal from the County Court of Westchester County to the Court of Appeals of New York. R. 32-36.

Said application was presented to Chief Judge Irving Lehman on May 28, 1941, and taken under advisement, together with briefs submitted on such date, and application was denied on October 2, 1941. (See certificate of Chief Judge Irving Lehman of the Court of Appeals of New York.) R. 36, 37.

2. *Statute here drawn in question.*

The legislation here drawn in question is a statute of the State of New York, known as Section 2147 of the Penal Law, entitled "Public Traffic on Sunday" and otherwise known as the "Sabbath Law", reading as follows:

> "All manner of public selling or offering for sale of any property upon Sunday is prohibited, except as follows:
>
> 1. Articles of food may be sold, served, supplied and delivered at any time before ten o'clock in the morning;

2. Meals may be sold to be eaten on the premises where sold at any time of the day;

3. Caterers may serve meals to their patrons at any time of the day;

4. Prepared tobacco, milk, eggs, ice, soda-water, fruit, flowers, confectionery, souvenirs, newspapers, gasoline, oil, tires, drugs, medicines and surgical instruments, may be sold in places other than a room where spirituous or malt liquors or wines are kept or offered for sale and may be delivered at any time of the day.

5. Delicatessen dealers and bakeries may sell, supply, serve and deliver cooked and prepared foods, between the hours of four o'clock in the afternoon and half past seven o'clock in the evening, in addition to the time provided for in subdivision one hereof.

The provisions of this section, however, shall not be construed to allow or permit the public sale or exposing for sale or delivery of uncooked flesh foods, or meats, fresh or salt, at any hour or time of the day. Delicatessen dealers shall not be considered as caterers within subdivision three hereof." R. 33, 34.

Other related sections of the Penal Law regarding the "Sabbath", pertinent to this inquiry, read as follows:

"Section 2140. The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

"Section 2142. Sabbath breaking is a misdemeanor, punishable by a fine not less than five dollars and not more than ten dollars, or by imprisonment in a county jail not exceeding five days, or by both, but for a second or other offense, where the party shall have been previously convicted, it shall be punishable by a fine not less

than ten dollars and not more than twenty dollars, and by imprisonment in a county jail not less than five nor more than twenty days."

3. *Substantial Federal Questions Presented.*

By motion to dismiss duly made in the Court of Special Sessions of Mount Kisco (R. 3); by affidavit for appeal and certificate of reasonable doubt presented to the County Court of Westchester County (R. 27-30); by briefs and argument filed in the County Court (R. 31); and by application for allowance of appeal from the County Court of Westchester County duly presented to Chief Judge Irving Lehman of the Court of Appeals of New York (R. 32-36), there were presented and raised before each of said courts the following questions:

(1) That petitioner is an ordained minister of Jehovah God, preaching the gospel by distribution of literature, and his activity did not come within the terms of the said statute but within the exceptions and therefore petitioner was not guilty.

(2) That the statute, as construed and applied to petitioner's activity, was unconstitutional and void, because it deprived him of his right of freedom to worship Almighty God as by Him commanded and according to dictates of petitioner's conscience, and also deprived petitioner of his right of freedom of press, all contrary to Section One of the Fourteenth Amendment to the United States Constitution.

The Court of Special Sessions wrote an opinion holding that the "Sabbath Law" in question applied to a minister of the Gospel in the same manner as to any commercial activity and held that the constitutional rights of petitioner had not been violated and thereby overruled the aforesaid Federal questions. R. 24-26.

The County Court of Westchester County specifically overruled each of the claims of law made by petitioner and overruled each Federal question presented to it and held

that the statute was applicable and that the petitioner was not denied his rights of freedom of press and worship, contrary to the Fourteenth Amendment to the United States Constitution. R. 31, 32.

Chief Judge Irving Lehman of the Court of Appeals of New York expressly passed upon the constitutionality of said statute and the aforesaid Federal questions, and held the same did not present a question of law that should be reviewed by the Court of Appeals. R. 26-37.

Therefore, there are presented to this Court for review substantial Federal Questions as follows:

Does the statute in question, as construed and applied by the courts below, violate Section One of the Fourteenth Amendment to the United States Constitution in that it deprives petitioner of his right of freedom to worship Almighty God according to the dictates of his conscience, and of freedom of press?

Does the statute, as fairly construed, include the activity of the petitioner, as an ordained minister of the gospel?

B

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and basically affect the fundamental personal and civil rights of every person domiciled within the United States. The courts of New York have rendered a decision on a most important Federal question in a way that nullifies the constitutional guarantees and provisions with respect to personal freedom. The opinions of the Court of Special Sessions and the County Court of Westchester County and order denying appeal by Chief Judge Lehman of the Court of Appeals have misconstrued opinions of this Court and warped them so as to distort their true meaning for the purpose of amputating petitioner's rights. The opinions and decisions of the New York courts are in direct conflict with

applicable decisions of this Court. The New York courts have radically and so far departed from the accepted and usual course of judicial proceedings as to demand an order of this Court halting such extraordinary departure from established principles of liberty and constitutional law.

On March 10, 1932, the Attorney-General of the State of New York wrote an opinion, construing this particular statute, Section 2147, in which he expressly held that the selling of "religious books" on Sunday by a minister of the Gospel or Sunday School teacher is not *"public selling or offering for sale"* included in the statute. (45 N. Y. State Dept. Reports 286) R. 24, 25.

In this connection, the Court's attention is invited also to the case of *People* v. *Finn*, 57 Misc, 569, 110 N. Y. S. 22, in which the defendant was committed by a city magistrate upon a charge of violating the Penal Code protecting the Sabbath, similar to this, by exhibiting Sunday moving pictures. The evidence showed that the act consisted in exhibiting pictures illustrating lectures delivered at the same time on the Bible story of Joseph and his brethren, and also an illustrated lecture on the lumber industry in California. It was held that the exhibition of such moving pictures in relation to a subject-matter of purely intellectual interest did not constitute "public sport, exercise, or show" so as to violate the Sabbath laws within the intention of the code.

By common consent of the people throughout every State of the Union, such as in the State of New York, the first day of the week, called Sunday, is set aside for rest and the practice of worshiping Almighty God. The law of the United States and of every state recognizes this. No law can be passed, of course, compelling the practice of any form of religion or worship on Sunday; but the laws protect anyone exercising his right to worship Almighty God according to the dictates of his conscience on Sunday in the manner chosen, such as was chosen by the petitioner in this case and as he was so exercising. The work of distribution of Bible literature and worshiping Almighty God by doing good unto

others in calling upon them at their homes and offering to them helpful Bible explanations in printed form, and taking from some persons receiving such literature small contributions to aid in producing and distributing more like literature, is deemed and considered benevolent and charitable and a work of necessity within the meaning of the law; that is, the Sunday or so-called "Sabbath law".

In prohibiting labor on Sunday and the sale of goods, wares and merchandise on Sunday, the law makes exceptions to labor of necessity and charity and the sale of necessities and the practice of the free worship of Almighty God according to the dictates of conscience.

In this case it is admitted and also not disputed that the petitioner was exercising his right to worship Almighty God by going from house to house offering to the people the booklet referred to, which relates to explanation of Bible prophecy and bringing to the readers' attention many other facts of importance now due to be known as existing in fulfillment of Bible prophecy and which the people vitally need to know. The petitioner testified that he was commanded by Almighty God to go from house to house and from door to door with this literature, and that he did so from a sense of moral duty or a feeling of kindness for humanity in his desire to warn them so that they might turn from one of the greatest disasters that the world will ever know, to wit, "the battle of that great day of God Almighty" at Armageddon, which is very near.

Therefore it is manifest that from the decisions and construction of the statute by the New York courts, a minister of the Gospel is not included and cannot be convicted for preaching the Gospel and simultaneously accepting money contributions on Sundays. Sunday is set aside as a time of worship and service of Almighty God. The work of the petitioner is benevolent and charitable, and it is to be noticed that he was following in the footsteps of the Lord Jesus and the apostles by going from house to house in preaching the Gospel. (See Mark 6:6; Luke 8:1; Acts 20:20; 1 Peter

2:9, 21.) The work of the petitioner was a work of necessity. (See 1 Corinthians 9:16; Hebrews 7:12; 8:3.)

Therefore the undisputed evidence shows that petitioner was engaged in acts of worship of Almighty God, according to the dictates of his conscience; and the undisputed evidence shows that he was engaged in "press" activity.

Although the statute is valid on its face, it is the wrongful and unconstitutional application thereof that makes it void, as this Court said in *Concordia Fire Insurance Co.* v. *Illinois,* 292 U. S. 535, 545:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

In answer to the contention that the statute is regulatory, we wish to point out that one can engage in the activity of preaching the Gospel on Sunday by distribution of literature free of charge without being subject to the statute and go anywhere he pleases or any time he pleases without regulation under the statute. The statute is not a regulatory statute, but prohibitory, and limits freedom of press and freedom of worship to free distribution of literature, thereby prohibiting the taking of contributions to assist in the benevolent work done by petitioner.

Therefore we submit that the courts in the case at bar have ruled directly contrary to *Schneider* v. *State,* 308 U. S. 147, *Lovell* v. *City of Griffin,* 303 U. S. 444, and *Cantwell* v. *Connecticut,* 310 U. S. 296, and have wrongfully deprived petitioner of his rights of freedom of press and freedom to worship Almighty God.

Wherefore your petitioner prays that this Court issue a writ of certiorari to the County Court of Westchester County, New York, directing such court to certify to this Court for review and determination on a day certain to be named

therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of that court be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

ERMINIO MORANTE
Petitioner

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